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No. 04-712

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LINCOLN PROPERTY COMPANY, *et al.*,
Petitioners,

v.

CHRISTOPHER ROCHE, *et ux.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICI CURIAE FOR THE REAL ESTATE ROUNDTABLE, NATIONAL MULTI HOUSING COUNCIL, AMERICAN HOTEL & LODGING ASSOCIATION, AMERICAN RESORT DEVELOPMENT ASSOCIATION, BUILDING OWNERS AND MANAGERS ASSOCIATION, INSTITUTE OF REAL ESTATE MANAGEMENT, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL APARTMENT ASSOCIATION, NATIONAL ASSOCIATION OF HOMEBUILDERS, NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS, AND NATIONAL ASSOCIATION OF REALTORS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

This case presents basic jurisdictional issues of exceptional importance to businesses—such as those in the commercial and residential real estate industry—that operate in multiple states through affiliated entities, including partnerships.[1] The overriding question concerns the manner in which federal courts should assess a business defendant's citizenship for purposes of establishing diversity jurisdiction. 28 U.S.C. § 1332(a). That question, in turn, governs the ability of business defendants to invoke their right under 28 U.S.C. § 1441(b) to remove an action to a federal forum. That removal right has long played a vital role in ensuring that, where federal jurisdiction exists, non-resident defendants may access federal courts and, more to the point, "a tribunal free from local prejudice." Pet. App. 15a-16a.

A case is removable if "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). This case was filed in Virginia state court. The only parties "properly joined and served as defendants" are petitioners Lincoln Property Company (Lincoln), a Texas corporation with its principal place of business in Texas, and State of Wisconsin Investment Board (SWIB), a Wisconsin entity. It is undisputed that neither defendant is a citizen of Virginia, as are respondents, and that the named parties are therefore diverse pursuant to 28 U.S.C. § 1332(a). Petitioners removed the case from state court to federal court pursuant to Section 1441(b), and the district court entered summary judgment in their favor. Pet. App. 39a, 88a. The Fourth Circuit, however, reversed and remanded with instructions that the case

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[1] Pursuant to this Court's Rule 37.6, amici notes that no part of this brief was authored by counsel for any party, and no person or entity other than amici made any monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a).

be returned to state court on the ground that defendants had "failed to carry their burden of proof with respect to their allegedly diverse citizenship." *Id.* at 2a.

In at least two critical respects, the Fourth Circuit's decision disrupts the settled framework for determining the citizenship of business defendants. First, the decision instructs courts to look beyond the citizenship of the defendant named in the complaint and to identify non-named affiliates that may destroy diversity under a "real parties in interest" analysis. Pet. App. 14a. Second, the decision concludes that the citizenship of a non-named limited partnership may be based on its "nexus" to the state in which the lawsuit is filed, as opposed to the citizenship of its partners. *Id.* at 16a. The decision thus transforms a basic jurisdictional determination into a free-wheeling, fact-intensive inquiry that considers the existence of non-named entities such as partnerships that might have a connection to a named defendant or the events at issue, and then gauges the "nexus" among any such affiliated entities, the parties named in the complaint, and the forum state. For businesses that operate in multiple states through various affiliates, the Fourth Circuit's decision is a recipe for uncertainty and wasteful litigation over a threshold jurisdictional determination made in thousands of cases each year—in the Fourth Circuit alone.

Amici have a direct and substantial interest in the proper resolution of the important jurisdictional issues presented by this case. Amici are The Real Estate Roundtable, National Multi Housing Council, American Hotel & Lodging Association, American Resort Development Association, Building Owners and Managers Association, Institute of Real Estate Management, International Council of Shopping Centers, National Apartment Association, National Association of Homebuilders, National Association of Industrial and Office Properties, National Association of Real Estate Investment Trusts, and National Association of Realtors. Lincoln is a member of the National Multi Housing Council and the

International Council of Shopping Centers. A description of the mission, organization, and activities of each of the amici associations is set forth in the addendum to this brief.

Amici represent a broad spectrum of commercial and residential real estate interests present in virtually every county in America. Amici's members include owners and lessors of commercial property such as office buildings, shopping centers, apartments, industrial and distribution facilities, hotels, and resorts. Their members also include developers, property managers, brokers, homebuilders, Realtors, Real Estate Investment Trusts, financial institutions, investment advisors, and individual and institutional investors. Amici's members routinely operate through separate legal entities including subsidiaries, trusts, partnerships, and limited liability companies in owning properties, conducting operations, and providing specific real estate services with respect to multiple properties in different states. The multi-faceted structure of such enterprises is based on legitimate business considerations discussed below, and reflects the practical challenges of doing business in the real estate industry.

The Fourth Circuit's decision is not only legally unfounded, but creates the potential for enormous uncertainty for amici's members with respect to a crucial jurisdictional determination. Even when, as here, a plaintiff has named as a defendant a business entity that is undeniably diverse, the Fourth Circuit's decision may require a court to question the existence of diversity jurisdiction and require the defendant to *disprove* a connection between non-named affiliates and the events at issue or the forum state. In addition, the Fourth Circuit's decision creates uncertainty as to the citizenship of partnerships and other entities—through which amici's members routinely operate—for purposes of establishing diversity by holding that citizenship may be based on a partnership's purported "nexus" (Pet. App. 16a) to a state rather than the citizenship of its partners. The Fourth Circuit's analysis will increase the costs of removing such suits

to federal court by generating collateral litigation over a threshold jurisdictional determination. Moreover, the Fourth Circuit's decision will create business and investment uncertainty to the extent that it deprives businesses of their statutory right to remove a case to federal court.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision holds that, in determining citizenship for purposes of diversity jurisdiction, a court should look beyond the citizenship of a defendant named in the complaint and impose on the defendant a burden to prove that the citizenship of affiliates *not* named in the complaint does not destroy diversity under a factbound and indeterminate "real party in interest" analysis. Applying that analysis, the Fourth Circuit reversed an extensively litigated judgment for petitioners on the merits and ordered that the case be sent back to state court to begin anew. The court did so on the ground that one of Lincoln's affiliates—a limited partnership that was not named as a defendant in the original complaint, joined in an amended complaint, or deemed a necessary and indispensable party—was "probably" a "real party in interest," and that the affiliate would destroy diversity based on its purported "nexus" to Virginia. Pet. App. 15a, 16a. That jurisdictional analysis is fundamentally flawed.

In the jurisdiction context, the "real party" concept was designed to inquire into the citizenship or legitimacy of the parties before the court and ensures that the named parties have a genuine stake in the case and thus may be counted in determining diversity. *See Carden* v. *Arkoma Assoc.*, 494 U.S. 185, 188 n.1 (1990); *Navarro Sav. Ass'n* v. *Lee*, 446 U.S. 458, 460-461 (1980). The Fourth Circuit's decision dramatically expands that concept by employing it to look *beyond* the parties named in the complaint and then obligating a defendant to establish that other entities are *not* a "real party in interest," even though the plaintiff has not named such entities in its complaint or argued that they were necessary and indispensable under Fed. R. Civ. P. 19. The Fourth Circuit's free-ranging "real party in interest" inquiry contravenes the terms of the removal statute, which explicitly place the focus on the citizenship of the "parties in interest *properly joined and served* as defendants," 28 U.S.C. § 1441(b) (emphasis added); departs from this Court's own precedents, which establish a " 'real *party to the controversy*' test," *Carden*, 494 U.S. at 188 n.1 (emphasis added); and ignores the time-honored rule that the plaintiff is "master of the complaint," *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 398-399 (1987). In short, with no justification, the Fourth Circuit has turned the settled diversity of citizenship analysis into a formula for uncertainty and—particularly for entities that operate in multiple states through various affiliates—an engine for destroying diversity jurisdiction.

The Fourth Circuit's other conclusion is equally problematic from the standpoint of the plethora of multi-faceted business enterprises prevalent in today's economy—and just as misguided as a matter of law. As this Court recently reaffirmed, the "accepted rule" is that a partnership "is a citizen of each state * * * of which any of its partners is a citizen." *Grupo Dataflux* v. *Atlas Global Group LP*, 124 S. Ct. 1920, 1923 (2004). The Fourth Circuit, however, concluded that a partnership may be a citizen of a state for purposes of diversity jurisdiction if it has "a very close nexus" to a state, even if none of its partners is a citizen of that state. Pet. App. 16a. That kind of inquiry may be appropriate in determining whether a court has *personal* jurisdiction with respect to a partnership, but it has no place in the calculation whether *diversity* jurisdiction exists. The Fourth Circuit's decision throws into potential disarray the citizenship of hundreds, if not thousands, of partnerships that operate or own property in the Fourth Circuit. Even if the Court concludes that the Fourth Circuit erred in looking beyond the defendants named in the complaint, the Court

should reaffirm that the citizenship of a partnership is based on the citizenship of its partners, not a "nexus" test.

Clear jurisdictional rules are vitally important for the proper functioning of the federal courts and the reliance interests of thousands of American businesses, including those in the real estate industry. The Fourth Circuit's unprincipled and unwieldy jurisdictional ruling should be reversed.

ARGUMENT

I. IN THE REAL ESTATE INDUSTRY, BUSINESSES ROUTINELY OPERATE IN MULTIPLE STATES THROUGH AFFILIATED ENTITIES

The jurisdictional issues presented by this case arise because of the corporate structure employed by Lincoln—the lead defendant named in the complaint. In the real estate industry, businesses such as Lincoln often choose to operate in multiple states through affiliated entities for widely accepted business considerations, including to limit their liability and to bring local investors and special service providers into a real estate venture or project. The Fourth Circuit not only failed to appreciate the appropriate reasons for doing business through such affiliates, but appeared to fault Lincoln for choosing to operate in that fashion. A proper understanding of the real estate industry is essential to the correct resolution of the jurisdictional issues presented.

1. There are thousands of businesses in the real estate industry across the county. Many of those businesses comprise separate affiliated entities that, in turn, provide real estate-related services or own property in multiple states. It is not uncommon for such enterprises to have complex structures, such as Lincoln's, with numerous legal entities. *See* Pet. App. 96a (chart of Lincoln-related entities). The Fourth Circuit observed that it found "the manner in which Lincoln conducts business (using many different structures)" to be "confusi[ng]." *Id.* at 16a n.16; *see id.* at 13a n.11. What is more, the court appeared to fault Lincoln for its

decision to do business through different entities. *See id.* at 14a ("[T]he citizenship of the real parties in interest escapes us because of the confusing structure of the Lincoln group of enterprises"). There is, however, nothing unusual or improper about Lincoln's multi-faceted business structure.

Real estate companies routinely do business in multiple states through separate entities created for particular properties, projects, or services. These subsidiaries, partnerships, and limited liability companies are created to be separate from a parent entity and from each other. It is critical that courts respect each entity's separate legal existence. That is just as true when it comes to determining citizenship for purposes of diversity jurisdiction as it is in making other legal determinations as to such entities. *Cf. United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.") (citation omitted); *Prudential Oil Corp.* v. *Phillips Petroleum Co.*, 546 F.2d 469, 475 (2d Cir. 1976) ("an intercorporate assignment between a parent and its subsidiary should be treated as presumptively ineffective for jurisdictional purposes") (citing *Lehigh Mining & Mfg.* v. *Kelly*, 160 U.S. 327 (1895)).

2. It is standard practice in the real estate industry for parent companies to create separate legal entities to own, lease, finance, manage, construct, or develop a single property. This entity is often referred to as a Special Purpose Entity, or SPE, and its "special purpose" is to own, lease, finance, manage, construct, or develop the single asset it holds. An SPE is also often created to undertake one specific service, such as property management, with respect to a number of properties owned by others, including other SPEs.

With respect to a site-specific SPE, the property may be a tract of single-family homes, an apartment complex, an office

park, a shopping mall, or a resort. The SPE is an entity that has no debts or obligations other than those related to that single property. A site-specific SPE conducts no business that does not relate to the specific property—it does not guarantee or assume the debts of any other person or entity, it does not co-mingle funds with those of any other person or entity, and it holds itself out as being a separate legal entity from any other person or entity. *See generally* Steven G. Horowitz and Kimberly B. Blacklow, *Use of Single Member Limited Liability Companies in Real Estate Finance Transactions*, Practicing Law Institute, 501 PLI/Real 157 (2004).

By way of example, consider a hypothetical parent corporation that desires to invest in 50 properties, one in each state across the country, and assume that these properties include urban office buildings, suburban office parks, urban apartment buildings, suburban retail shopping centers, and industrial facilities. The parent entity is likely to set up a separate business entity—for example, a partnership or limited liability company—for each of the individual properties. The precise structure chosen for each separate business entity will be based on the type of investment being made by the parent corporation and by any additional investors in the venture. The partnership structure gives the parties the flexibility to share in the economics of the transaction based on considerations such as capital contributed, risk tolerance, and expected yield. Although the parent will be affiliated with each of these entities in some fashion, none of the properties will be held directly by the parent and each of the affiliates will therefore have a separate legal existence.

Real estate businesses also provide services to different properties throughout the country through different partnerships, limited liabilities companies, or other entities. For example, a parent corporation with multiple properties owned by separate SPEs might form a number of partnerships with local service providers to offer services such as property management (*i.e.*, maintenance, cleaning, concierge, security,

parking), property development (*i.e.*, obtaining entitlements and permits, and designing the property), construction (*i.e.*, new construction or renovations), or structured financing (*i.e.*, loaning funds directly or arranging loans with banks and other lenders). Sometimes parent companies will venture together with other businesses that provide such real estate services and form SPEs for such a purpose.

3. There are four primary reasons for creating separate legal entities to invest in separate properties or undertake services with respect to multiple properties: financing, flexibility in structure, limitation of liability, and taxation.

Financing. Nearly all commercial real estate transactions, like nearly all residential real estate transactions, involve borrowing money from an institutional lender. Today's lenders typically require a business entity that owns or is developing a property to be an SPE with no assets or operations other than the particular project securing the loan. By requiring that the property be held by an SPE, the institutional lender is better able to assess the risks involved in making the loan and better able to ensure that the loan's performance will be impacted solely by the quality and operation of the mortgaged property, not other factors.[2]

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[2] Commercial mortgages are increasingly bundled together and sold as commercial mortgage-backed securities in a national market to private investors. The credit rating for such securitized loans is based primarily, if not solely, on the property involved, not the creditworthiness of the borrowers. *See* Kathleen O. McKune, *Special Purpose Entities—Who, What, Why, Where, When, and How?*, Practical Real Estate Lawyer, 20 No. 6 Prac. Real Estate Law 7 (2004); *Legal Criteria for U.S. Structured Finance Transactions*, Standard & Poor's, ch.3 (2004). Moreover, some lenders will make commercial mortgaged-backed loans only if the property owner agrees to limit its obligations to the single property. *See* Alvin L. Arnold and Marshall Tract, *Construction & Development Financing* § 5:45.50 (3d ed. 2004).

An institutional lender providing financing for a suburban retail shopping center can underwrite the loan by analyzing the risks of financing that specific shopping center—including the likely business viability, revenue, operating costs, and value—based on the geographic location and the particular sector of the real estate market involved. But it is more difficult for the lender to analyze and predict the risk of the loan if it must attempt to evaluate the potential performance of 49 other properties spread across multiple urban and suburban landscapes and varied sectors of the real estate market.

Institutional lenders also prefer individual properties held in isolation from other properties to protect themselves from the potential bankruptcy of any business organization affiliated with the borrower. They do not want the poor performance of any other property owned by the borrower, its sponsors, or its affiliates to jeopardize their loan. In other words, institutional lenders require that the property they are financing be isolated from any other debts or obligations related to any other asset. A lender that is financing the development of an apartment complex in midtown Atlanta, or construction of a tract of single-family homes in suburban Denver, for example, might require that its financing not be used toward the management of an office building in Manhattan or land speculation in California's Central Valley. By requiring use of an SPE, banks can insulate their loan from dependence on the success or failure of other properties.[3]

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[3] The concept of structurally isolating the legal ownership of an asset through an SPE is known as being "bankruptcy-remote" and protects lenders against "substantive consolidation," a judge-made doctrine that allows the bankruptcy court to treat multiple entities as a single debtor. *See generally* Richard D. Jones and Richard A. Bendit, *Practical Advice on the Preparation of the Substantive Non-Consolidation Opinion in Real Estate Transactions*, American Law Institute, SHO96 ALI-ABA 469 (2003).

Flexibility. Utilizing an SPE for each individual property provides real estate businesses with needed flexibility. A real estate company is rarely the only entity involved in a real estate venture; rather, it partners with different investors on a property-by-property or group-of-properties basis. Sometimes the real estate business will need a financial partner, such as a pension fund, foundation, endowment, individual investor, or investment fund. Other times the real estate business will need to partner with a local contractor or a special service provider like a golf course developer.

These partners, whether financial investors, local contractors, or special service providers, insist on having an interest in only one specific property—the one with which they are involved. Holding the property in an SPE is the industry-accepted way to provide these venture partners with an ownership interest that reflects their investment. For example, a financial partner who contributes 25 percent of the equity required to build an office park in suburban Chicago wants that office park held in a legal structure that accurately reflects his interest and is isolated from other ventures undertaken by the developer. And, likewise, a golf course developer partnering with a homebuilder to incorporate a golf course into a retirement community in western North Carolina wants the property held by a legal structure that reflects the parties' interests with respect to that venture alone. If the property were held by the parent entity, along with all the other properties in which neither the office park investor nor the golf course developer has any interest, the structure would fail to reflect the actual contribution of these specific partners and would increase the risks of their investment.

Limitation of Liability. Real estate entities also use SPEs to limit liability to that business entity's assets. The investor described above who is willing to invest in a suburban office park in one state wants to avoid any potential liability for a tenant dispute or property damage claim in a retail shopping center in another state with which the investor has no in-

volvement, contributed no investment, and analyzed no risks. By creating SPEs that hold single assets, the parent and its transaction partners or affiliates may avoid the risk of preexisting liabilities and insulate each property from liability problems involving other property. Real estate investors are particularly concerned about potential uninsured property liabilities such as tenant failures or environmental hazards. In addition, by creating SPEs to perform specific services, a parent company and its partners may limit their exposure from liability that may arise from other real estate operations.

Taxation. Nearly all states impose taxes for carrying on or doing business in that state. If all 50 of the properties in the hypothetical example above were held together by one corporation or one unincorporated entity, each state could make its own calculation of the proper allotment of net income from all 50 properties to that state—rather than taxing precisely the business that was done in that state. *See, e.g., Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331, 335 (1939) (state tax for privilege of doing business in state can be based on net income and is not limited to income from business within that state); *Reuters Ltd.* v. *Tax Appeals Tribunal*, 623 N.E.2d 1145, 1147 (N.Y. 1993) (international corporation doing business in 80 countries required to pay New York corporate franchise tax based on apportionment of worldwide net income), *cert. denied*, 512 U.S. 1235 (1994). By using separate business entities to conduct and carry on business in separate states, real estate companies may simplify their tax assessment administration and, at the same time, more fairly and accurately allocate their tax liability.

The successful functioning of the real estate industry—a critical sector of the United States economy—depends in large measure on giving effect to these separate business structures, which may take a variety of forms that include the elements discussed above. Moreover, the proper functioning of the real estate market is key to the growth and stability of financial markets that provide mortgage loans, real-estate

backed securities, and investment capital. The Fourth Circuit overlooked these important considerations, faulted Lincoln for operating in an industry-accepted fashion, and created a jurisdictional rule that is likely to upset this vital market.

II. THE FOURTH CIRCUIT'S DECISION INVITES JURISDICTIONAL DISORDER FOR BUSINESSES THAT OPERATE THROUGH AFFILIATED ENTITIES IN MULTIPLE STATES

Clarity is a matter " 'of first importance' " (*Navarro*, 446 U.S. at 464 n.13) (citation omitted) in fashioning basic jurisdictional rules. The Fourth Circuit's decision throws into disarray the settled framework for determining diversity of citizenship. If it is allowed to stand, it will generate uncertainty for the hundreds, if not thousands, of real estate firms that operate in multiple states through affiliated entities concerning the fundamental question whether diversity jurisdiction exists and the related—and equally important—question whether a case is removable to federal court. The confusion that that is likely to be generated by the Fourth Circuit's analysis is reason alone to reject that analysis.

1. As this Court recently emphasized, "[u]ncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful." *Grupo Dataflux*, 124 S. Ct. at 1930; *see also Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995) (jurisdictional rules should not depend on fact-specific inquires that are "hard to apply, jettison[] relative predictability for the open-ended rough-and-tumble of factors," and "invite[] complex argument in a trial court and a virtually inevitable appeal"); *Burnham* v. *Superior Court of Cal.*, 495 U.S. 604, 626 (1990) (plurality opinion) (jurisdictional rules have long been designed "to avoid * * * uncertainty and litigation over the preliminary issue of the forum's competence"); *Sisson* v. *Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring). The Fourth Circuit's decision creates uncertainty over a basic jurisdictional determination

undertaken by federal courts thousands of times each year. Such uncertainty leads to business risks which create new costs. Lenders, investors, and other market participants in the real estate industry accordingly abhor unnecessary risks.

2. The stark contrast between the district court's diversity analysis and the Fourth Circuit's analysis underscores the uncertainty that is likely to be fostered by the decision below. The district court's jurisdictional inquiry was clear and straightforward. It looked to the complaint and determined the citizenship of the defendants that respondents—Virginia citizens—had chosen to sue. *See* Pet. App. 84a-85a, 87a-88a, 92a-93a. Respondents sued (1) Lincoln, which is indisputably a Texas citizen, because it is a Texas corporation with its principal place of business in Texas, *see Louisville, C. & C. R.R.* v. *Letson*, 43 U.S. 497, 558 (1844); 28 U.S.C. § 1332(c)(1) (citizenship of corporation is the place of incorporation and its principal place of business); and (2) SWIB, a Wisconsin entity. Based on the citizenship of Lincoln and SWIB—*i.e.*, the named defendants—diversity of citizenship undeniably exists. Those defendants, moreover, have a direct interest in this case. *See* Pet. 11.[4]

By contrast, the Fourth Circuit held that "the citizenship of the nominal parties listed on the Complaint is in *no way* dispositive of subject matter jurisdiction." Pet. App. 17a (emphasis added). Thus, although the Fourth Circuit did not

[4] In addressing respondents' post-judgment motion for remand, the district court also considered the citizenship of one of Lincoln's affiliates, EQR/Lincoln Limited Partnership (EQR). The district court found that EQR is a citizen of Texas, because its partners are citizens of Texas. *See* Pet. App. 87a-88a, 92a-93a; *Carden*, 494 U.S. at 192-193, discussed *infra*. The district court did not hold that it was *necessary* to consider the citizenship of EQR in determining whether diversity jurisdiction exists. But rather in disposing of respondents' motion, the court simply explained that jurisdiction would exist "even assuming" that EQR had been named as a defendant. Pet. App. 88a.

question that diversity exists with respect to the parties named in the complaint, the court held that it was necessary to look beyond the defendants named in the complaint and to ascertain the citizenship of any purported "real parties in interest." *Id.* at 14a. In applying that analysis, the court attempted to canvass Lincoln's business affiliates and ascertain how they were related to the action. *Id.* at 11a-14a. The court openly acknowledged that it had difficulty in understanding Lincoln's business structure and described it as "confusing." *Id.* at 14a; *see id.* at 13a n.11.

The Fourth Circuit focused on EQR/Lincoln Limited Partnership (EQR), which was not named as a defendant, though it speculated that there may also be other non-named entities that could destroy diversity. Pet. App. 15a-16a. EQR is a Lincoln affiliate that manages the property underlying petitioners' claim. As the district court explained, EQR was formed in Delaware and is a Texas citizen for purposes of determining diversity jurisdiction because its partners are Texas citizens. *Id.* at 87a-88a; *see* note 4, *supra*. The Fourth Circuit acknowledged that EQR's listed partners are Texas citizens and that the record does not establish that any EQR partner is a citizen of Virginia. Pet. App. 12a-13a. Nonetheless, the court held that EQR was probably a "real and substantial party in interest" based on EQR's activities in managing the apartment complex where respondents lived; that EQR effectively must be regarded as a citizen of Virginia because it "owns land and operates a substantial part of its business in Virginia, thus establishing a very close nexus with the Commonwealth"; that EQR would destroy "complete diversity" if the action had been "maintained" against it or if EQR had been "joined"; and that the case therefore "should be remanded" to state court. *Id.* at 16a-17a.

3. The Fourth Circuit's jurisdictional analysis is the antithesis of a clear and predictable rule. Under the Fourth Circuit's analysis, a business defendant with multiple affiliates cannot be assured that the citizenship determination will

be based on its own legal citizenship. Instead, the defendant may be asked to prove that one of its affiliates is *not* a real party in interest to the case, even though the affiliate was not named as a defendant. That "real party in interest" inquiry is inherently fact-bound and indeterminate. For example, in this case, the Fourth Circuit demanded "evidence" concerning whether, or to what extent, non-named affiliates "are distinct or uninvolved" in the "business enterprises" of the named defendant and "property holdings." Pet. App. 11a. The Fourth Circuit's analysis also obligates federal judges to unravel complex business structures that go beyond the parties before the court. The upshot is that a business defendant may not predict with any certainty whether it will be able to establish diversity, and thus will not be able to predict whether a case is removable from state court to federal court. In addition, federal courts will be required to make potentially complex factual determinations just to determine whether a case is removable in the first place.

Furthermore, the Fourth Circuit's analysis of the citizenship of EQR—the non-named affiliate that the court deemed to probably be "the real party in interest"—will generate uncertainty as to the citizenship of partnerships for diversity purposes. As explained below, the "accepted rule" is that a limited partnership (or partnership) "is a citizen of each state or foreign country of which any of its partners is a citizen." *Grupo Dataflux*, 124 S. Ct. at 1923 (citing *Carden*, 494 U.S. at 192-195). The Fourth Circuit, however, did not base its determination that EQR destroyed diversity on the citizenship of EQR's partners (which are Texas citizens, *see* note 4, *supra*), but rather on the notion that EQR has "a very close nexus with the Commonwealth, which is much stronger than any nexus to Texas made apparent by the record." Pet. App. 16a. That "nexus" analysis creates great uncertainty for partnerships—many of which are engaged in the real estate business—because they can no longer assume that they can establish diversity based on the citizenship of their partners

and, instead, are left to guess as to whether a court will find that their purported "nexus" with a particular state is sufficient to destroy (or support) diversity jurisdiction.

4. The uncertainty created by the Fourth Circuit analysis will generate "wasteful" (*Grupo Dataflux*, 124 S. Ct. at 1929) litigation. In this case, for example, respondents sued Lincoln because its trade name was used in connection with the management of the property underlying the suit. Pet. 11. Lincoln answered the complaint fully prepared to satisfy any award against it, removed the case to federal court based on the diversity of the parties named in the complaint, and litigated the case to a judgment in its favor. Yet, on appeal, the federal courts determined—for the first time—that a non-named affiliate of Lincoln was a "real party in interest," and that the affiliate was a citizen of Virginia based on its "nexus" to the state. Even though the plaintiffs had not named the affiliate as a defendant, or even attempted to join the affiliate as a party, the Fourth Circuit reversed the judgment in respondents' favor and ordered that the case be remanded to state court for the litigation to begin over again.

Neither the federal courts nor litigants (whether plaintiffs or defendants) are well-served by such a haphazard and duplicative approach to such a threshold jurisdictional determination. As this Court has already recognized, "[j]urisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources." *Navarro*, 446 U.S. at 464 n.13 (quoting David Currie, *The Federal Courts and the American Law Institute, Part I*, 36 U. Chi. L. Rev. 1 (1968)). Accordingly, the "policy goal" is to "minimize[e] litigation over jurisdiction," *Grupo Dataflux*, 124 S. Ct. 1929, not to *foster* it. The litigation and uncertainty that is almost certain to be generated by the Fourth Circuit's decision counsels strongly, if not decisively, against adopting that analysis.

III. THE FOURTH CIRCUIT'S JURISDICTIONAL ANALYSIS IS FUNDAMENTALLY FLAWED

In concluding that diversity jurisdiction is lacking, the Fourth Circuit committed two fundamental errors. First, the court looked *beyond* the citizenship of the parties named in the complaint for non-named affiliates that might destroy diversity under a "real parties in interest" analysis. Pet. App. 14a. Second, the court concluded that the citizenship of a non-named limited partnership may be based solely on its factual "nexus" to the state in which the lawsuit was filed. *Id.* at 16a. Each of those errors requires reversal.

1.a. The overriding question in this case is whether Congress has conferred subject matter jurisdiction over respondents' action. Section 1332(a)(1) of title 28 grants federal jurisdiction over certain controversies between "citizens of different States." *See also* U.S. Const. art. III, § 2. Jurisdiction is not conferred unless there is "complete diversity" among all plaintiffs and defendants. *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806). The removal statute provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction"—including diversity jurisdiction—"may be removed by the defendant" to federal district court. 28 U.S.C. § 1441(a). The statute further provides that diversity cases "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b).

In determining whether complete diversity—and therefore federal diversity jurisdiction—exists, this Court has held "that the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy." *Navarro*, 446 U.S. at 460. Thus, federal courts have long applied a "'real party to the controversy' test" to determine "which of various parties *before the Court* should be considered for purposes of determining whether there is complete diversity of citizenship." *Carden*, 494 U.S. at 188

n.1 (emphasis added); *see id.* at 200 ("[O]ne of the benchmarks for determining whether a particular party *among those involved in the litigation* must be counted for purposes of diversity jurisdiction has been whether the party has a 'real interest' in the suit or, in other words, is a 'real party' to the controversy.") (O'Connor, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) (emphasis added).

Rule 17(a) of the Federal Rules of Civil Procedure embodies that line of decisions and provides that "[e]very action shall be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). Rule 17(a) further specifies that certain individuals, such as a "trustee of an express trust," "may sue in the person's own name without joining the party for whose benefit the action is brought." *Ibid.* Although the two inquiries are not identical, this Court has observed that "[t]here is a 'rough symmetry' between the "real party in interest" standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of the real parties to the controversy." *Navarro*, 446 U.S. at 463 n.9.

The "'real party to the controversy' test" (*Carden*, 494 U.S. at 188 n.1) has been most commonly applied in the case of plaintiffs, *i.e.*, the situation addressed by Rule 17(a). In determining plaintiffs' citizenship, federal courts look to whether the party bringing the action has a real and substantial interest in the case or is instead merely a nominal party suing on another's behalf. *See, e.g., Navarro*, 446 U.S. at 465-466; *Coal Co.* v. *Blatchford*, 78 U.S. (11 Wall.) 172, 177 (1871); *McNutt* v. *Bland*, 43 U.S. (2 How.) 9 (1844). Likewise, courts will prevent a nominal or fraudulently joined co-plaintiff from destroying complete diversity by disregarding that party in determining diversity of citizenship. *See, e.g., Iowa Public Serv. Co.* v. *Medicine Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977) ("[I]f the 'nondiverse' plaintiff is not a real party in interest, and is purely a formal or nominal party, his or its presence in the case may be ignored in determining jurisdiction."); 14B Charles Alan Wright *et al.*,

Federal Practice and Procedure § 3723 (3d ed. 1998) ("[I]t is well-settled that the district court will not allow removal jurisdiction to be defeated by the plaintiff's destruction of complete diversity of citizenship by the collusive or improper joinder of parties or the assignment of claims.").

Likewise, with respect to defendants, the "real party to the controversy" test prevents a plaintiff from defeating diversity or removal jurisdiction by naming a non-diverse defendant with no real interest in the case. If a named defendant lacks any real and substantial interest in the controversy, a court should ignore that defendant's citizenship and only examine the citizenship of other named defendants in determining whether complete diversity exists. *See, e.g.*, *Wood* v. *Davis*, 59 U.S. (18 How.) 467, 469 (1856) ("It has been repeatedly decided by this court, that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction."); *Wilson* v. *Oswego, TP*, 151 U.S. 56, 62-65 (1882) (considering whether certain named defendants were "purely formal and unnecessary parties" whose citizenship should be ignored). Similarly, jurisdiction may not be "defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *see also Wormley* v. *Wormley*, 21 U.S. (8 Wheat.) 421, 451 (1823). The "real party to the controversy" test thus ensures that the diversity calculation is based only on those parties involved in the action that have a real interest in the action.

b. Here, the Fourth Circuit did not dispute that complete diversity exists among the parties before the court: respondents (from Virginia), Lincoln (from Texas), and SWIB (from Wisconsin). Nor did the court dispute that the named parties—including Lincoln, which showed up to defend against this action and secured a judgment in its favor after extensive litigation—were proper parties. Instead, in determining whether diversity jurisdiction exists, the court looked

beyond the parties named in the complaint; concluded that a separate affiliate of Lincoln—not named in the complaint—"probably" was a real party in interest, Pet. App. 15a; concluded that "*both*" Lincoln and the separate entity "should be parties," *id.* at 16a (emphasis added); and held that complete diversity is lacking on the ground that the non-named affiliate was a citizen of the same state as respondents. For several reasons, that analysis is fundamentally flawed.

First, the Fourth Circuit's analysis contravenes the terms of the removal statute, which governs diversity actions, such as this case, that are initially filed in state court. As noted, the removal statute specifies that a civil action brought in state court may be removed by a defendant on the basis of diversity jurisdiction "only if none of the parties in interest *properly joined and served as defendants* is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b) (emphasis added).[5] According to the plain language of the statute, the only parties whose citizenship is relevant for purposes of considering whether jurisdiction exists are those who were "properly joined and served as defendants"—here, Lincoln and SWIB. Nothing in the removal statute authorizes a federal court to look *beyond* the parties "properly joined and served as defendants" to defeat removal on the basis of the citizenship of entities *not* named in the complaint or parties to the case. Furthermore, the language that Congress used in the removal statute is consistent with a proper understanding of this Court's "real party to the controversy" case law, which, as discussed next, focuses the citizenship inquiry on the parties before the court.

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[5] The removal statute also provides that, "[f]or purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded." 28 U.S.C. § 1441(a). The focus on the "defendants sued" in Section 1441(a) squares with Congress's focus in Section 1441(b) on only those defendants "properly joined and served as defendants."

Second, the Fourth Circuit's decision is based on a misapplication of this Court's precedents. As discussed above, in applying the "real party to the controversy" test, this Court has focused on "which of various parties *before the Court* should be considered for purposes of determining whether there is complete diversity of citizenship." *Carden*, 494 U.S. at 188 n.1 (emphasis added). After all, it is a " 'real *party to the controversy*' test." *Ibid.* (emphasis added). For example, the Court has looked to whether the named plaintiff has a real and substantial interest in the controversy, *see, e.g.*, *Navarro*, 446 U.S. at 465, or whether the plaintiff has joined a sham defendant in order to defeat jurisdiction, *see, e.g.*, *Wilson*, 257 U.S. at 97. In this case, by contrast, the Fourth Circuit looked outside of the parties named in the complaint and held that complete diversity was destroyed by a separate entity that was *not* named in the complaint. We are not aware of any case in which this Court has applied the "real party to the controversy" test to destroy diversity jurisdiction by invoking the citizenship of a non-named, *potential* defendant.

To the contrary, this Court has recognized that the presence of *potential* defendants that might have a real interest in the case if named or joined does not destroy the diversity jurisdiction that exists with respect to the parties before the court. *See, e.g.*, *Lumbermen's Mut. Cas. Co.* v. *Elbert*, 348 U.S. 48 (1954). In *Elbert*, this Court held that diversity jurisdiction existed where a Louisianan who had been injured in a car accident brought suit directly against the Illinois insurer of the driver of the car, another Louisianan. The Court recognized that both the injured plaintiff and the insurer defendant were real parties in interest, and that diversity existed between those parties. The fact that the tortfeasor/insured—who was not named in the complaint—also had a real interest in the controversy did not destroy diversity jurisdiction between the actual parties in the case. *Id.* at 51-52.

Nothing in this Court's decision in *Navarro*, on which the court of appeals relied (Pet. App. 3a-4a), supports the conclu-

sion that a court is obligated to look beyond the defendants named in a complaint to determine whether there are any real parties in interest that, if joined, would destroy diversity jurisdiction. Rather, as this Court recently emphasized in *Carden*, 494 U.S. at 191, the Court in *Navarro* examined whether the named *plaintiffs* who brought the lawsuit—*i.e.*, the individual trustees of a business trust—were the "real parties to the controversy." *Navarro*, 446 U.S. at 460-461. The Court's decision answering that question in the affirmative in no way supports the Fourth Circuit's conclusion that it was obligated to look outside of the complaint for potential *defendants* that, if joined, would destroy diversity.

Third, the Fourth Circuit's analysis is inconsistent with the time-honored rule that the plaintiff is the "master of the complaint." *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002). As "master of the complaint," a plaintiff not only may "eschew[] claims based on federal law * * * to have the cause heard in state court," *ibid.* (quoting *Caterpillar Inc.*, 482 U.S. at 398-399), but also may forego litigation or claims against potential defendants with a real and substantial interest in the case, *see Lumbermen's Mutual Casualty Co.*, 348 U.S. 48 (permitting plaintiff to sue diverse insurer in federal court by not naming non-diverse tortfeasor). Indeed, plaintiffs routinely choose to forego litigation against potential defendants for strategic reasons or other considerations. In addition, plaintiffs may seek to join additional defendants when new facts come to light during the course of litigation. *See* Fed. R. Civ. P. 20.

Respondents—the plaintiffs in this case—chose to name only two defendants: Lincoln and SWIB. Pet. App. 85a. It is undisputed that those parties are citizens of different states than respondents, and that complete jurisdiction therefore exists among the parties before the court. The Fourth Circuit speculated that another entity—"probably" EQR—was a citizen of Virginia and has an interest in this case. Pet. App. 15a-16a. However, respondents—the master of their com-

plaint—chose not to name, join, or serve EQR. The Fourth Circuit's reliance on its own speculation to find a lack of complete diversity exceeded the scope of the court's authority; the court found a lack of complete diversity based on the theoretical citizenship of an entity that is not a defendant and may or may not have an interest in the litigation.

Even if a non-diverse, putative defendant exists, courts "regularly exercise diversity jurisdiction in cases where nondiverse individuals or groups who are not direct parties to the litigation nevertheless have a crucial interest in its outcome." *E.R. Squibb & Sons, Inc.* v. *Accident & Cas. Ins. Co.*, 160 F.3d 925, 936 (2d Cir. 1998). For purposes of determining whether diversity of citizenship exists, the focus must be on the parties that the plaintiff has chosen to name.

Fourth, the Fourth Circuit's jurisdictional analysis also unnecessarily intrudes on the province of Rule 19 of the Federal Rules of Civil Procedure. Rule 19 carves out a narrow circumstance in which federal courts *do* have authority to consider the existence of non-named entities whom the plaintiff could have—but chose not to—name in an action. Under Rule 19(a), if a court concludes that a plaintiff has failed to join a necessary party, the court may order the joinder of that party. Rule 19(a) does not apply if joinder would "deprive the court of jurisdiction over the subject matter of the action," Fed. R. Civ. Proc. 19(a), such as where jurisdiction is founded on diversity and the necessary party would destroy diversity. Under Rule 19(b), however, if the court concludes that a missing person that may not be made a party under Rule 19(a) is "indispensable," the court may order that the case be dismissed. *See, e.g., Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968) (a federal court should dismiss an action under Rule 19 only if a non-named, non-diverse party is both necessary and indispensable); *National Union Fire Ins. Co.* v. *Rite Aid of S.C., Inc.*, 210 F.3d 246, 254 (4th Cir. 2000) (dismissing

case for lack of subject matter jurisdiction because non-diverse party was necessary and indispensable).

Rule 19 therefore provides an established mechanism for addressing the rare case in which diversity jurisdiction exists based on the parties named in the complaint, but the plaintiff has failed to name a necessary and indispensable party that, if joined, would destroy diversity. The Fourth Circuit below acknowledged Rule 19, but did not conclude that EQR or any other non-named entity or affiliate of Lincoln was a necessary and indispensable party. *See* Pet. App. 7a n.5. Indeed, the Fourth Circuit did not engage in any formal Rule 19 analysis in this case, and there is no reason to conclude that EQR would qualify as a necessary and indispensable party under Rule 19. Instead, the Fourth Circuit applied a watered down—and inappropriate—quasi-Rule 19 inquiry in holding that diversity jurisdiction was lacking, and that the case should be dismissed, based on its conclusion that a non-named entity was a real party in interest. *See* Pet. App. 16a.

Finally, the Fourth Circuit's analysis creates an unmanageable and inefficient regime. Federal courts are obligated continuously to ensure that subject matter jurisdiction exists in the cases before them. *See FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 230-231 (1990); *see also* Pet. App. 7a; 28 U.S.C. § 1447(c). Especially in complex litigation involving sophisticated business entities, the Fourth Circuit's rule creates a ticking time bomb that may derail a case founded on diversity jurisdiction because a party may at any juncture assert that a non-named entity is in fact a real party in interest that, if joined, would destroy diversity of citizenship, and it will be necessary for courts—including appellate courts—to keep a constant look-out for potential non-diverse affiliates of corporate defendants. Indeed, in this case, the Fourth Circuit *sua sponte* plunged into its misguided "real party in interest" analysis, even though respondents had not directly challenged on appeal the district court's ruling that removal based on diversity of citizenship was proper.

The "real party to the controversy" test is inherently fact-bound. But, as this case illustrates, the free-wheeling approach adopted by the Fourth Circuit may compel a court of appeals to engage in factual speculation about unnamed persons or entities to assure itself that diversity jurisdiction exists. By contrast, a rule that makes clear that the "real party" analysis is limited to the parties *named* in the complaint ensures that any potential jurisdictional pitfalls are identified at the outset of litigation on the basis of a straightforward analysis—before both the parties and the courts invest substantial resources in litigating the case, and in a setting in which factual development is plausible.

2. The Fourth Circuit committed another fundamental error in concluding that diversity jurisdiction was lacking. Even if this Court concludes that the Fourth Circuit properly looked beyond the named defendants to determine whether jurisdiction exists, the court of appeals erred insofar as it held that the citizenship of a non-named limited partnership may be based on its purported factual "nexus" to a state, as opposed to the citizenship of its partners.

After looking beyond the parties named in the complaint to determine whether complete diversity existed, the Fourth Circuit held that a non-named Lincoln affiliate—"probably" EQR, a limited partnership—was a real party in interest, and that the entity must be deemed a citizen of Virginia based on its allegedly "very close nexus" to the state. Pet. App. 15a, 16a. That conclusion, too, is erroneous. A corporation is a citizen of its principal place of business and its place of incorporation—regardless of where it may conduct business, or of the nexus that it might have with a state. 28 U.S.C. § 1332(c)(1). And the "accepted rule" is that a partnership is a citizen of each state of which its partners is a citizen—regardless of its activities in other states. *Grupo Dataflux*, 124 S. Ct. at 1923 (citing *Carden*, 494 U.S. at 192-195).

At least outside the Fourth Circuit, the courts of appeals that have addressed the issue have hewed to the rule that the location in which a partnership does business does not effect its citizenship for purposes of diversity. These courts have held that a partnership's business activities may not be considered in determining a partnership's citizenship. For example, in *Conntech Development Co.* v. *University of Connecticut Educational Properties, Inc.*, 102 F.3d 677 (2d Cir. 1996), the Second Circuit determined that a partnership was a citizen of New Jersey and Ohio—which is where its corporate partners were citizens—even though the partnership conducted business wholly within Connecticut. *Id.* at 681. Likewise, in *Taber Partners, I* v. *Merit Builders, Inc.*, 987 F.2d 57 (1st Cir. 1993), the First Circuit held that a partnership comprised of two New York corporations, whose principal places of business were New York, was only a citizen of New York—even though the partnership's purpose was to manage property in Puerto Rico. *Id.* at 63-64.

By contrast, the Fourth Circuit held that a limited partnership may qualify as a citizen of a state if it has "a very close nexus" with the state. Pet. App. 16a. In this case, for example, the court pointed to evidence "that the property at issue is in Virginia, the mold abatement services contracted for were in Virginia by a Virginia company, Lincoln maintains several rental properties in Virginia other than the one at issue here, Lincoln has a regional office in Virginia, and all of the correspondence and communication related to this controversy occurred in Virginia." *Id.* at 15a; *see id.* at 16a (the non-named entity "owns land and operates a substantial part of its business in Virginia"). The court thus transformed the clear and predictable *Carden* rule that a partnership is a citizen of each of the states in which its partners are citizens into an indeterminate and fact-intensive "nexus" test.

Even if this Court concludes that the Fourth Circuit erred as a threshold matter in looking beyond the parties named in the complaint to determine diversity of citizenship, amici

urge this Court to make clear that the Fourth Circuit further erred in concluding that the citizenship of a partnership may be established by its nexus to a state, rather than the citizenship of its partners. As discussed above, if left undisturbed by this Court, that aspect of the Fourth Circuit's ruling could generate enormous uncertainty for the hundreds, if not thousands, of real estate partnerships that have some nexus to a state in the Fourth Circuit, but nevertheless are not a citizen of that state under the settled rule recognized in *Carden*. Accordingly, it is vital that the Court make clear that the Fourth Circuit's "nexus" analysis is unfounded as well.

IV. THE FOURTH CIRCUIT'S DECISION WILL IMPROPERLY DEPRIVE BUSINESSES OF THEIR STATUTORY REMOVAL RIGHT

The Fourth Circuit's decision creates a diversity-destroying rule that will improperly deprive business defendants of their statutory right to remove a case to federal court where diversity jurisdiction properly exists if they cannot establish diversity under the Fourth Circuit's open-ended analysis. That is all the more reason to reverse the decision below.

Diversity jurisdiction has been a fundamental component of federal court jurisdiction since the founding. *See* U.S. Const. art. III, § 2; Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78. It serves a vital policy objective. As this Court has explained, "the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views." *Great S. Fire Proof Hotel Co.* v. *Jones*, 193 U.S. 532, 544 (1904); *see also* 6A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1556 (2005) ("basic purpose of diversity jurisdiction is thought to be the protection of out-of-state parties from the possible prejudice of local courts"); The Federalist No. 80, at 534 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("the national judiciary ought to preside in all cases in which one

state or its citizens are opposed to another state or its citizens" because "having no local attachments" it will be impartial and unbiased); *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) (access to a "wholly impartial tribunal, namely, the federal court sitting in that state" is necessary because "consciously or otherwise, the courts of a state may favor their own citizens").

Moreover, as noted above, when a plaintiff files an action in state court over which the federal courts would have diversity jurisdiction, defendants have a statutory right to remove the action to federal court, as long as "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b); *see Caterpillar, Inc.* v. *Lewis*, 519 U.S. 61, 68 (1996). As this Court recognized long ago, "[t]he right of choosing an impartial tribunal is a privilege of no small practical importance." *Marshall* v. *Baltimore & Ohio R.R.*, 57 U.S. 314, 329 (1853). Thousands of out-of-state defendants choose to exercise that right each year and remove state actions to federal courts in order to obtain a potentially more impartial forum. In 2003, more than 44,000 cases were removed from state court to federal court (considering all bases of jurisdiction). *Judicial Business of the United States Courts 2003*, Table S-7 (*available at* www.uscourts.gov/judbus2003/tables/s7.pdf). Out-of-state businesses, in particular, are often concerned that they may experience local prejudices by being forced to litigate in a foreign state court.

The Fourth Circuit's decision may improperly deprive out-of-state businesses of their statutory right to remove cases to federal court where diversity jurisdiction exists under a proper analysis. Indeed, in this case, Lincoln removed the action to federal court based on the diversity of citizenship among the parties named in the complaint and obtained a judgment in its favor in the district court. But the Fourth Circuit reversed that judgment and ordered that the case be sent back to state court based on the application of its mis-

guided "real party in interest" analysis. Moreover, the Fourth Circuit concluded that some Lincoln affiliate, "probably" the limited partnership EQR, was a Virginia citizen based on its purported "nexus" to Virginia, even though none of EQR's partners is a citizen of Virginia. That analysis could deprive partnerships in the real estate business of their right to remove a case to federal court in any state in which the partnership owns, leases, manages, or is developing property.

Because they operate through many entities—including partnerships—in different states, real estate businesses will be disproportionately penalized under the Fourth Circuit's rule. The decision below creates a potential diversity-destroying engine for such entities and thus may deprive businesses of their right to seek an impartial federal forum.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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ADDENDUM

DESCRIPTION OF AMICI CURIAE

American Hotel & Lodging Association. The American Hotel & Lodging Association (AH&LA) is a dual membership association of state and city partner lodging associations throughout the United States. AH&LA was established in 1911 and is based in Washington, D.C. AH&LA has some 10,000 property members nationwide, representing more than 1.4 million guest rooms. It provides members with advocacy on Capitol Hill, research and information on the lodging industry, and other services designed to ensure a positive business climate for the U.S. lodging industry.

American Resort Development Association. The American Resort Development Association (ARDA) is a Washington, D.C.-based trade association representing the vacation ownership and resort development industries. The ARDA was established in 1969 as the American Land Development Association and today has nearly 1000 members, ranging from privately held companies to major corporations, which are located and do business in the United States and overseas.

Building Owners and Managers Association. The Building Owners and Managers Association (BOMA) International is an international federation of 108 local associations. BOMA International's 19,000 members own or manage more than nine billion square feet of downtown and suburban commercial properties and facilities in North America and abroad. The mission of BOMA International is to advance the performance of commercial real estate through advocacy, professional competency, standards and research.

Institute of Real Estate Management. The Institute of Real Estate Management (IREM) has been the source for education, resources, information and membership for real estate management professionals for more than 70 years. IREM is an affiliate of the National Association of Realtors

and is the only professional real estate management association serving both the multi-family and commercial real estate sectors. The IREM has 82 chapters in the United States as well as eight international chapters. IREM serves as an advocate on issues affecting the real estate management industry. Membership includes nearly 16,000 individual members and 530 corporate members. Collectively, IREM's members manage more than 6.5 billion square feet of commercial space and more than 13 million residential units, totaling more than $848.2 billion in real estate assets.

International Council of Shopping Centers. The International Council of Shopping Centers (ICSC) is a global trade association representing the interests of the shopping center industry. The ICSC was founded in 1957 and has more than 50,000 members in the United States and elsewhere around the world representing owners, developers, retailers, lenders, and other professionals. Nearly 45,000 of the ICSC's members are in the United States and represent nearly all the 46,990 shopping centers in the United States.

National Association of Homebuilders. The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association representing more than 220,000 members involved in home building, remodeling, multi-family construction, property management, subcontracting, design, housing finance, building product manufacturing, and other aspects of residential and light commercial construction. The NAHB is affiliated with more than 800 state and local home builders associations around the country. NAHB's builder members will construct about 80 percent of the more than 1.84 million new housing units projected for 2005, making housing one of the largest engines of economic growth in the country.

National Association of Industrial and Office Properties. The National Association of Industrial and Office Properties (NAIOP) is the nation's leading trade association

for developers, owners, investors and asset managers in industrial, office, and related commercial real estate. NAIOP was founded in 1967 and is comprised of more than 12,000 members in 50 North American chapters. It provides networking opportunities, educational programs, research on trends and innovations and strong legislative representation.

National Association of Real Estate Investment Trusts. The National Association of Real Estate Investment Trusts (NAREIT) is the national trade association for REITs and publicly traded real estate companies with a combined market capitalization of about $294 billion. Members are real estate investment trusts (REITs) and other business entities that own, operate, and finance income-producing real estate, as well as firms and individuals who advise, study, and service those businesses. NAREIT's principal mission is to communicate about REITs and real estate investment to members, policymakers nationwide, the investment community, the media, and the public. NAREIT regularly represents the REIT and real estate investment community before Congress and the Executive Branch, provides research on the REIT industry, and publishes information about REITs.

National Association of Realtors. The National Association of Realtors (NAR) is a non-profit association that represents more than one million members engaged nationwide in all phases of the real estate business, including brokerage, appraising, management, and counseling. NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. NAR's members contribute to such activities as safeguarding real property rights, promoting equal opportunity in housing, real estate licensing, neighborhood revitalization, and public service, and promoting cultural diversity.

National Multi Housing Council and the National Apartment Association. The National Multi Housing

Council and the National Apartment Association (NMHC and NAA) represent the nation's leading firms participating in the multi-family rental housing industry. The combined memberships of NHMC and NAA are engaged in all aspects of the apartment industry, including ownership, development, management, and finance. The NMHC represents the principal officers of the apartment industry's largest and most prominent firms. The NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. The NAA is the largest national federation of state and local apartment associations and is comprised of 164 affiliates and represents more than 31,505 professionals who own and manage more than five million apartments across the country. NMHC and NAA jointly operate a federal legislative program and provide a unified voice for the private apartment industry.

The Real Estate Roundtable. The Real Estate Roundtable (Roundtable) is a federal policy organization comprised of real estate industry leaders. Its members are the Chairmen, Presidents, and CEOs of the nation's 100 leading commercial and multifamily firms, and the Managing Directors of major financial institutions. The Roundtable also includes the elected leaders and executive directors of major real estate trade organizations. The Roundtable serves as the vehicle through which industry leaders come together to identify, analyze, and advocate policy positions on issues important to the national real estate community. The Roundtable's business and trade association leaders work collectively to ensure a cohesive industry voice is heard by government officials and the public about relevant real estate policies. Collectively, Roundtable members hold portfolios containing over 2.5 billion square feet of developed property valued at more than $250 billion. Participating trade associations represent more than one million people involved in virtually every aspect of the real estate business.